Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of Public Notice. Regarding AMTRAK Request for Waiver of Certain Part 80 AMTS Rules "To Implement PTC"	 DA 11-322 WT Docket No. 11-27

To the Chief, Wireless Telecommunications Bureau

Reply Comments

Including with regard to
Petition for Reconsideration
And
Motion to Dismiss

"Petitioners," the undersigned entities, submitted in this docket 11-27 and regarding this DA 11-332, as shown in the docket (i) the above captioned Petition for Reconsideration and Motion to Dismiss ("Petition Recon-Dis"), and (ii) Comments. Herein, Petitioners submit Reply Comments to other parties filings to date in this docket, and regarding the unopposed Petition Recon-Dis. Herein, the "Request" mean the AMTRAK request for rule waivers in subject of DA 11-332, for licensing rule waivers prior to any license assignment request or license grant.

The Petition for Reconsideration and Motion to Dismiss
is Unopposed and Should be Granted
and Summary Reply Comments

No party filed in this docket n opposition thereto, or substance in a filing with content opposing the facts and law in the Petition Recon-Dis. [1] The Petition Recon-Dis was unopposed

[1] Petitioners' office informed the undersigned (working at another location) that it received in the mail an Opposition from AMTRAK counsel. However, this office's staff and the undersigned do not find a copy filed with the FCC in this docket, which is the means the FCC stated for all filings pertaining to the AMTRAK Request subject of DA 11-332 and was thus how

and for the good causes stated therein, should be granted, the Request dismissed and the docket terminated. The FCC chose to set a short pleading cycle in this matter. The FCC should grant the Petition Recon-Dis at this time.

Alternatively, the Request should be denied due to an improper attempt at conversion of an established radio service to an new one, without proper public notice and comment in rulemaking, with no need showing of this conversion (why other spectrum is not available and suitable), no technical showing, and employing lack of candor as to the real parties in interest and real situation in nation regarding railroad wireless and its component called Positive Train Control.

AMTRAK and it supporters (herein, "PTC-220 Group")[2] regurgitate the same story they gave the FCC in WT Docket No. 10-83 (regarding MCLM assignment of AMTS spectrum to SCRRA (terms defined in the Petition Recon-Dis). Petitioners in this docket referenced and incorporated their filings in that MCLM-SCRRA docket, which is permissible and efficient. While this is not controversial, we attach as Appendix 1 below a discussion of applicable law on permissible reference and incorporation in FCC pleadings. To be clear, again, Petitioners reference and incorporate herein all of the filings in that SCRAA docket.

MCLM and the PTC-220 Group have, by now, filed a half dozen *Trojan Horse* FCC filings (seeking to get their foot in the FCC door, as to accepting MCLM spectrum assignments, including typically with may use and technical rule waivers, as a precedent for others to come)

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the Petition Recon-Dis was filed. Said opposition is thus not before the FCC and may not be considered if filed with FCC staff contrary to DA 11-223.

[2] Persons who research PTC beyond the surface hype understand (see Petitioners filings in this docket and the SCRRA docket, for example) it is PTC 220 LLC and the several for-profit private freight railroads that are pushing 217-222 MHz on other railroad for PTC use, since and use their track-rights and other leverage for that. Those private companies behind PTC 220 MHz LLC are engaged for profit in PTC, including use of public funds to make the equipment in that frequency range. We use this defined term to reflect this situation.

each time seeking that the FCC look the other way as to the rule violations and license invalidity of MCLM: the spectrum the assignors seek, and look only to the assignors stated needs, not demonstrated by need and technical showings.

In response, Petitioners cited US Supreme Court and other court and FCC precedents demonstrating that the assignors need and qualifications, even if real and demonstrated, cannot launder defends in the subject FCC license. The PTC-220 Group do not refute that law in any way, but merely posture with the FCC: they are big, well known entities, and the FCC should do what they want since they have influence and will use it. Petitioners will challenge that as need be, to defend the Communications Act and the public interest behind it.

This is frivolous and an abuse of process: major private railroads serving the nation, major public railroads, and major law firms, playing games before the FCC, with unlawful procedure (as in this subject AMTRAK Request) and no substance other than their big-entity posturing, to get public airwaves just because they want it for their personal gain.[3] Any person with a modest education in wireless—and all of the PTC-220 Group and the communications-practice attorneys in their support here understand that with SDR and Cognitive Radio (and even with more common modern digital technology including IP based wireless), there is no need for US railroads to (i) use one band for PTC or any application, (ii) for PTC to be pursued

[3] As noted in their filings in this docket, and in the SCRAA docket, Petitioners show that the PTC-220 Group, with the public railroads as proxies and partners, and the law firms in support—all of this is for private gain, including of the staff involved. It is contrary to public law including public-agency procurement law (applicable to SCRAA, AMTRAK and other publicly owned railroads). Instead, persons involved in all of these, when acting contrary to law, are acting for private purposes.

Petitioners offer spectrum including in 217-222 MHz at no cost, and some on nonprofit basis, to US local and state government agencies for smart transportation including PTC that is legitimate and sound. AMTRA, SCRAA and other railroads, to date, reject that and instead seek solely to buy spectrum from MCLM under influence of PTC-220 LLC. This is unlawful including against US antitrust law, and certainly against pubic agency procurement law.

independent of the needed new wide-area wireless for many applications, and (iii) for more spectrum than what Railroad already have, if they used it efficiently. AMTRAK and the rest of this PTC-220 Group completely failed in this docket to demonstrate any need for the subject spectrum, or for 220 MHz-range spectrum in particular, or for PTC as a stand-alone application (which is what their story to the FCC suggests). The referenced Internet links on PTC, and attached materials, in Petitioners previous filings in this and the SCRRA docket, demonstrate the above. The FCC staff should not have to spend time attempting to find out what petitions like AMTRAK and the PTC-220 Group conceal from the FCC where that information is at the heart of the subject Request. Again, by a study of the above-noted materials submitted to the FCC, this AMTRAK Request, like the SCRAA assignment and waiver application, is a Trojan House for PTC-220 LLC and its private interests, and none of this is justified by good engineering or good use of the public airwaves under the Communications Act.

To begin with, all in this PTC 220 LLC Group know-- since the information is stated in pleadings by Petitioners on the MCLM licenses involved, and in the assignment application file numbers, and in FCC Enforcement Bureau letters of investigation of MCLM and affiliates—that compelling factual documents demonstrate that MCLM violated many FCC rules in Auction 61 and otherwise including false statements to the FCC to win the subject AMTS spectrum, and that upon applying FCC law, these licenses are invalid. Petitioners were the lawful high bidders for those licenses. MCLM and these companies in the PTC 220 Group, under cover of their Communications "law" attorneys, are trying one, after another, ploys to get the FCC to grant assignments and waivers so they can get the MCLM spectrum that was unlawfully obtained. One unlawful means on top of the other. That is not practice of law, and the attorneys involved are not beyond sanction by the FCC or a court, for aiding, abetting, and profiting in the actions of

MCLM that violate FCC law and US criminal code, 18 USC §1001 et seq.[4]

In sum, nothing submitted by AMTRAK or its supporters (the PTC-220 Group) in this docket supports grant of the Request, or opposed the Petition Recon-Dis. No need showing, no technical showing, etc.

Contrary to AMTRAK, it is not up to a challenger (Petitioners or Hammert & Edisson or others) to demonstrate lack of need, or engineering of any kind, rather, it is up to a petitioner to demonstrate that it meets FCC standards under §1.925. AMTRAK entirely failed to do so and its supported did not remedy this lacking, or could they if they tried: only the petitioner can make its case for rule waivers. As Petitioners and Hamert & Edisson each predicted in this docket in their initial filings, AMTRAK was a Trojan House or Stalking Hourse for other railroads, and sure enough, PTC 220 LLC, AAR (representing freight railroads including PTC 220 LLC member-owners), and SCRAA then came forward to support. They all planned this from the start, with MCLM for purposes noted herein.

AMTS Need a New, Accurate TV Interference Study
AMTRAK and other AMTS Technical Rule Waivers
Cannot Show a Good Engineering Basis for this Reason Alone

[4] Petitioners respect the role of legal counsel in advocating for clients, and also understand and respect the considerable immunity involved, but that is not absolute. Where counsel are aware of fraud on the United States, evidence of crimes, and other serious violations of law, they may cross the line and become personally liable. The courts are not consistent or clear in these matters, but all agree there is a line that may be crossed. In this case, Petitioners believe the line is being crossed. In addition, seeing this possibility for their clients and themselves, said legal counsel are clearly employing means like this AMTRA Request as a means to expedite assignments of MCLM spectrum before the FCC and/or courts find MCLM and parties laundering is spectrum in violation of law. Said attorneys will then, of course, plead that the FCC cannot reverse the grants (of assignments, waivers, etc.) Rather than cooperate with the FCC in its investigation of MCLM and the extensive violations of law shown in the applicable FCC records, these attorneys and their clients pretend that there is no concern at all. See, e.g.. the statements in the Keller & Heckman ex parte letter to Ruth Milkman at the FCC dated January 21, 2011. In this docket also, AMTRAK and the PTC 220 Group evade that topic, for reasons just noted.

Petitioners have no relation with Hammet & Edison ("H&E") or any of the TV station clients. H&E filed Comments and Reply Comments in this docket. Petitioners agree with some of the fundamental statements and indications of H&E and discussed this directly with H&E today (the day of this filing). Petitioners always seek direct discussion with parties in FCC proceeding to attempt advancement of the public interest involved, and reduction of contested issues before the FCC where possible. (Petitioners did that with AMTRAK but AMTRAK would not discuss effectively and with SCRAA but it also would not discuss substance, etc.)

As reflected in its two filings in this docket, H&E made a convincing case to Petitioners that the FCC standard for AMTS stations to protect TV stations on Channels 10 and 13 that is based on the decades-old Eckert Report is outdated and inaccurate. Most current TV stations on these channels are or will soon be digital, and receivers have changed also, verses the old analog TV transmitters and receives of decades ago.

Petitioners discussed with H&E joint efforts with associations of TV stations to petition the FCC for appropriate rule making, and submitting appropriate engineering, for the purpose noted above.

The FCC should commence new rulemaking for this purpose, upon receipt of said petition for rulemaking or on its own motion. It is clear this is needed. Until such new rulemaking is commenced and concluded, the FCC should not act on any AMTS technical rule waivers.

Conclusion

For reasons given above, the actions Petitioners requested should be granted.

[Execution on next page.]

Respectfully submitted, March 11, 2011,

Warren C. Havens
President of each Petitioner listed below

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Appendix 1

Regarding Reference and incorporation in FCC pleadings

(Reasons for this Appendix in this filing is indicated in the text above.)

Reference and incorporation ("R&I") of factual and other material is permitted in FCC proceedings under conditions noted below. R&I is an accepted practice in legal proceedings both in courts and in government agency proceeding, including before the FCC, and including by the FCC itself in its proceedings. The sole issue with regard to acceptable R&C is whether, in a particular case of it, it is relevant and otherwise clear and reasonable (as with any other pleading practice). This is shown in all FCC decisions and court decisions on R&I—including the ones cited by in the Opposition. For example,

(a) See *In re: Entercom Portland License, LLC, DA 08-495*, Rel. March 4, 2008 (emphasis added):

> In the Objections, Stolz incorporates by reference the Petition to Deny against the Sacramento Applications. n5/ Stolz argues [**5] that the Applications should not be granted because Entercom has shown a "wanton disregard for the FCC's rules" as evidenced by:....
> ---
> n5/ Although the Sacramento Applications are not before us here, we will consider the allegations contained in the Petition to the extent they are relevant to Stolz' claims in this proceeding.

In the just cited case, the issue is not the incorporation by reference itself, but whether it is relevant. In addition, this was reference to allegations in a pleading (with factual allegations and arguments) whereas, in my Request, the subject is only incorporation by reference to pre-existing factual documentation (if that is not relevant in a particular case, then of course it should be rejected in said case).

(b) The Commission itself does the same. See, e.g., *In the Matter of Communications TeleSystems International Application...MO&O, DA 96-2183,* 11 FCC Rcd 17471; 1996 FCC LEXIS 7206, Rel. Dec. 31, 1996 (emphasis added):

> We placed CTS's application on public notice on July 28, 1995. n7 AT&T filed a petition to deny. n8 CTS filed an opposition to AT&T's petition to deny n9 and AT&T replied. n10 Because the issues raised by CTS's application are substantially similar to those raised by TNZL's facilities-based application, we incorporate by reference the record in that proceeding. AT&T, MCI and Sprint filed petitions to deny TNZL's application....

(c) The DC Circuit Court and other Circuit Courts accept the same. See, e.g., Artis v Bernake, 630 F.3d 1031; 2011 U.S. App. LEXIS 519; 111 Fair Empl. Prac. Cas. (BNA) 300; 94 Empl. Prac. Dec. (CCH) P44,078, Decided January 11, 2011 (emphasis added):

> "Despite this evidence in the notes of the Board's own counselors, the district court found the secretaries "fail[ed] to provide any meaningful information about specific instances of discrimination." 474 F. Supp. 2d at 19. To the contrary, the secretaries argued consistently that they "counseled fully and completely to the extent allowed by the Board." Dist. Ct. Docket No. 42, at 7. Their response to the Board's motion to dismiss incorporated by reference the previously filed counselors' reports. Id. at ii. In a motion for reconsideration, the secretaries directed the district court's attention to individual counseling reports, including those of Carter, Dorey, Love-Blackwell, and Williams, and quoted them at length. Dist. Ct. Docket No. 72, at 2-3, 17-28. As the Board admitted in response to that motion, "[t]hese reports . . . have previously been filed with [the district court] by both plaintiffs and defendant on numerous occasions and their contents have been exhaustively discussed in the parties' pleadings." Dist. Ct. Docket No. [*18] 73, at 2. The Board therefore conceded that the evidence of successful counseling that is now before us was properly before the district court.

This case shows, in the decision text and in the summary provide by Lexis, that these previously filed pleadings were not in the identical case, with fully identical parties.

Allegations in one proceeding against a party's or its practice, or other matters, may obviously be relevant in another proceeding, not only since many facts may be common, but since a licensee's violations or compliance in one matter, is indeed considered by the FCC in another case. (As a few examples, revocation or sanction proceedings under 47 USC 312, and in a 47 USC 308 proceeding, the *Policy Regarding Character Qualifications in Broadcast Licensing, Report, Order and Policy Statement,* 102 F.C.C. 2d 1179 (1985).)

Relevance is not dependent on the location of the facts at issue, but whether they are relevant. "Relevance," in the common law of evidence, is the tendency of a given item of

evidence to prove or disprove one of the legal elements of the case, or to have probative value to make one of the elements of the case likelier or not. The United States Court of Appeals for the District of Columbia Circuit explains the concept of "matter properly provable" as follows: (emphasis added):

> The initial step in determining relevancy is therefore to identify the "matter properly provable." As Professor James explained in a highly-regarded article, '[t]o discover the relevancy of an offered item of evidence one must first discover to what proposition it is supposed to be relevant."

*United States v. Foste*r 986 F.2d 541 (D.C. Cir. 1993) citing James, Relevancy, Probability and the Law, 29 Cal. L. Rev. 689, 696 n. 15 (1941).

Indeed, in any petition to deny, the standard of relevance is already set by statute and regulation. 47 USC §309(d), and supporting case law (examples above), specifically allow submission by the petitioner/ challenger (which carries forward into reconsideration appeals under 47 USC 405) of relevant facts, supported by an affidavit, and allow the FCC to "officially notice" other facts, including if referenced in the text of a petitioner pleading. The facts the Commission may notice include any that are relevant and available, especially those in FCC records, and of those the most readily accessible are those filed in USL under the license(s) subject of the challenge petition.

Further, FCC rule § 1.49 allows use of copies of pre-existing documentation in pleadings which includes the catch-all "otherwise specifically provided" category.

> Specifications as to pleadings and documents.
> ….The foregoing shall not apply to … official publications, charted or maps, original documents (or admissible copies thereof) offered as exhibits, specially prepared exhibits, or if otherwise <u>specifically</u> provided. All copies shall be clearly <u>legible</u>.

The meaning of "exhibits" is that they are referenced and incorporated in the pleading (in relevant part). The Petition R&I materials were all "specifically provided" by clear identification of their identity and location in FCC records, and were also all "clearly legible." Section 1.49

does not required that all "specifically provided" referenced materials be appended as physical exhibits, either. Indeed, where a filing is electronic (as inn the case of the subject Petition), and said existing documentation is already on file in FCC public records (such as on ULS or ECFS), there is no physical attachment anyway, in as much as attachments to a pleading may be, and often are, uploaded separately (and in many cases, must be, to retain their original character, or for file-size limitations). Whether said referenced materials is uploaded in the same ULS File No. as the subject matter, or in another FCC public record location, does not change the requirements discussed above of (i) specificity, (ii) relevance, and (iii) legibility.

[End of Appendix.]

Certificate of Service

I, Warren C. Havens, certify that I have, on this 11h day of March 2011, caused to be served by placing into the USPS mail system with first-class postage affixed a true copy of the foregoing *"Petition for Reconsideration and Motion to Dismiss,"* to the below-listed parties[5]

Copies served by email, indicated below, are for convenience. (Petitioners attempt, on their side, to expedite FCC proceedings they are involved with by said complimentary email service.)

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Other parties will be served also.
Those filing in the docket and any others that under FCC rules
Or courtesy should be served.

Warren Havens

[5] Said delivery to the US Postal Service may be after business hours, and if so, the postmark will be the following business day.